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# **“IS NOTHING SACRED?”: FLAG DESECRATION, THE CONSTITUTION AND THE ESTABLISHMENT OF RELIGION**

JAMES MCBRIDE\*

*“Patriotism is in political life what faith is in religion.”*

*-Lord Acton*

## **I. INTRODUCTION**

Lord Acton's aphorism succinctly captures the sentiments expressed by political figures and the public alike in the present constitutional controversy over flag desecration. Reverence for the nation's standard is expressed in hallowed tones; however, it is generally assumed that this relationship remains a metaphor and no more. The metaphoric distance between religion and politics embodies the separation of church and state, and legal discourse prevents its collapse into an established civil religious order. Yet, from the standpoint of a “hermeneutics of suspicion,” Lord Acton's aphorism belies an intimate relationship between flag and faith that transcends mere analogy.

This kinship, which threatens to rise to consciousness in the political response to flag-burning, is camouflaged by a legal discourse which treats the issue as if it were a matter of free speech. Hence, the Supreme Court opinions in *Texas v. Johnson*<sup>1</sup> and *United States v. Eichman*<sup>2</sup> serve as an alibi for the religio-political character of the controversy. However, neither *Johnson* nor *Eich-*

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<sup>1</sup> 109 S. Ct. 2533 (1989). In *Johnson*, the United States Supreme Court held that a conviction for burning an American flag in political protest violated the first amendment right of free speech. *Id.* at 2538-48.

<sup>2</sup> 110 S. Ct. 2404 (1990). In *Eichman*, the defendants were charged with violating the Flag Protection Act of 1989 by knowingly setting fire to several United States flags while protesting the Act's passage. *Id.* at 2406-09. However, the Court held that the Act suppressed expressive conduct and was therefore an infringement on first amendment rights. *Id.* at 2408-09.

man satisfied those who called for special protection of the nation's standard by means of the Flag Protection Act of 1989<sup>3</sup> (the "Act") or a proposed constitutional amendment.<sup>4</sup>

In this respect, legal and political discourse are at odds. Legal discourse strains to repress the popular outcry whose inarticulate and at times incoherent expression, even by the highest elected officials, testifies to the totemic status of the flag. Despite the attempts of courts and legal scholars to construct the controversy along free speech lines,<sup>5</sup> flag desecration remains for actors and spectators alike an essentially homeopathic and contagious magical act that defiles the sacredness of the body politic. The metaphoric distance between flag and faith collapses in the act of flag-burning. It is not surprising that many outraged citizens call for the institutionalization of what sociologists have dubbed "religious interdiction"—codified behavior against desecration of sacred objects. Of

<sup>3</sup> Pub. L. No. 101-131, 103 Stat. 777 (1989) (amending 18 U.S.C. § 700 (1988)). Following the *Johnson* decision, Congress passed the Act to replace the then existing federal flag burning statute. See *Eichman*, 110 S. Ct. at 2407 n.3; S. REP. NO. 152, 101st Cong., 1st Sess. 6 (1989). Former section 700(a) prohibited "knowingly cast[ing] contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it." 18 U.S.C. § 700(a) (1988).

The Flag Protection Act provides in pertinent part:

(a) (1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both. (2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (1989).

<sup>4</sup> See S.J. Res. 332, 101st Cong., 2d Sess., 136 CONG. REC. S8632 (1990). The proposed constitutional amendment provided that: "Congress and the States shall have the power to prohibit the physical desecration of the flag of the United States." *Id.* On June 21, 1990, the House of Representatives, by an overwhelming vote, declined to pass the constitutional amendment. See 136 CONG. REC. S8632 (1990) (statement of Sen. Biden); Wash. Times, June 22, 1990, at A1. The House quashed the amendment against flag burning, embracing arguments from Democratic leaders that the amendment would erode free-speech protection of the Bill of Rights for the first time in its 199-year history. See *id.* The victory of the Democratic leadership came despite last minute lobbying by President Bush. *Id.* However, House Republican leaders vowed to resurrect the issue next January in Congress. *Id.* On June 26, 1990, the Senate also failed to obtain the required two-thirds majority and declined to pass the constitutional amendment. See 136 CONG. REC. S8693-8739 (1990).

<sup>5</sup> See, e.g., *Eichman*, 110 S. Ct. at 2407-09 (first amendment protects flag burning as expressive conduct); *Johnson*, 109 S. Ct. at 2540 (flag burning as part of political demonstration is expressive conduct); cf. *Spence v. Washington*, 418 U.S. 405, 409-10 (1974) (attaching peace sign to flag is expressive conduct); *Smith v. Goguen*, 415 U.S. 566, 588 (1974) (White, J., concurring) (wearing pants with small flag sewn on seat is expressive conduct); *Board of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (saluting flag is communicative conduct).

course, the consequence of criminalizing desecration breaches the wall that separates the sacred and the secular, church and state, and would establish civil religion not just as a subtext of popular political discourse, but as the law of the land. Hence, the free speech construction of flag-burning marks the disengagement of legal discourse from political realities—an absence which seeks to defuse the power of popular sentiment by ignoring it. But such a strategy threatens to backfire in forthcoming political campaigns.

Superficially, arguments over the construction of this dispute appear to be no more than technical points of constitutional interpretation. Having determined whether flag desecration falls under the category of speech or religion, legal scholars lay out their arguments accordingly. Yet, only the theoretical construction acknowledging the religious character of flag desecration recognizes the profound dangers for the law itself. The sacralization of the nation-state, implicit in a constitutional amendment to ban flag desecration, establishes more than religion. It establishes the supremacy of popular political discourse over that of the Anglo-American legal tradition.

While American constitutional theory advocates *difference* as a legal analogue to Durkheimian organic solidarity, the majoritarian sentiments behind the flag desecration amendment represent the vestigial appearance of *resemblance* or mechanical solidarity.<sup>6</sup> Hence, popular political discourse seeks to efface the alterity of individuals within the body politic by criminalizing the "other": anyone who disagrees with the values espoused by the nation-state. If resemblance is writ large in patriotism (dominated by the normative world view of a white, patriarchal, middle- and upper-class social order) and expressed in pietistic devotion to the flag, one need not look far before finding the "other" in our midst—the poor, women, gays and lesbians, and people of color. Movements for social change designed to empower those "others" are therefore regarded not only as dangerous to the dominant so-

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<sup>6</sup> See E. DURKHEIM, *THE DIVISION OF LABOUR IN SOCIETY* 31-88, 149-75 (W.D. Halls trans. 1984). Durkheim distinguished between the types of social solidarity prevalent in relatively simple pre-industrial societies—mechanical solidarity, and that prevalent in more complex, modern societies—organic solidarity. See Coser, *Introduction* to E. DURKHEIM, *supra*, at xii-xviii. Durkheim further asserted that societies based on mechanical solidarity relied on repressive or penal sanctions which involved punishment for transgression and deviance from shared standards. *Id.* Societies based on organic solidarity in which individual rights were central, however, relied on restitutory sanctions, aimed at righting the balance upset by the violation. *Id.*

cial order but unpatriotic as well. In this context, the establishment of the civil religion of the state is an attempt to solidify the position of dominant social elites and their institutionalized ethos by marginalizing out-groups—yet, at what cost? Patriotism may call for sacrifice, but not of the very foundation of the Anglo-American legal tradition of individual rights.

In light of the power and seriousness of the controversy's civil religious character, it would be a mistake for jurists and legal scholars to refuse to engage the issue of flag desecration on the ground of the first amendment religion clauses. For it is precisely the heartfelt religious feelings for the nation's standard that propelled the passage of respective state statutes and the Flag Protection Act of 1989 and drives the movement for the proposed constitutional amendment. Only by exposing the religious wellspring behind this exercise in national piety can jurists and legal scholars demythologize the majoritarian political groundswell and defend the integrity of legal rights theory.

The purpose of this Article, then, will be fourfold: to deconstruct the Supreme Court decisions in the flag desecration cases and demonstrate their inadequacies; to unveil the totemic meaning behind popular speech about the flag; to analyze desecration as a magical violation of taboo; and to draw out the serious theoretical ramifications resulting from the establishment of religious interdiction as constitutional law.

## II. FLAG DESECRATION: THE LEGAL DISCOURSE

Although the debate over flag-burning was initiated in the streets of America, the courtroom's legal discourse quickly eclipsed political confrontation. Twice in the past two years, the Supreme Court has had to address and articulate the rhetorical configuration of the issue. In each case, the High Court voted by a slim 5-4 majority to overturn the statutory prohibition against flag desecration.<sup>7</sup> Led by Senior Associate Justice William Brennan, the majority methodically tested the viability of the challenged state and federal statutes against the well-recognized compelling state interest standard and found wanting the government's case for restricting the expressive conduct. In stark contrast, Chief Justice William Rehnquist's dissenting opinion asserted that flag-burning was conduct, not speech, and therefore not protected under the first

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<sup>7</sup> See *supra* notes 1-2 and accompanying text.

amendment,<sup>8</sup> and Justice John Paul Stevens' dissenting opinion argued that if flag-burning were considered expressive conduct, it undermined speech itself and should be proscribed.<sup>9</sup>

In *Texas v. Johnson*, the Supreme Court considered the government's case against Gregory Lee Johnson, who was arrested for burning an American flag in a political protest outside the Republican National Convention in 1984 on two grounds: "preserving the flag as a symbol of national unity and preventing breaches of the peace."<sup>10</sup> Written by Justice Brennan, the majority opinion disposed of the government's latter argument, holding that the Texas statute<sup>11</sup> was both over-broad and unnecessary.<sup>12</sup> "[T]he flag desecration statute was not drawn narrowly enough to encompass only those flag-burnings that were likely to result in a serious disturbance of peace."<sup>13</sup> Moreover, as the Court below observed, the statute appeared to be redundant since another section of the Texas Penal Code specifically provided sanctions against breaches of peace, regardless of their precipitating cause.<sup>14</sup> The government's

<sup>8</sup> See *Johnson*, 109 S. Ct. at 2554 (Rehnquist, C.J., dissenting). "It was Johnson's use of this particular symbol, and not the idea that he sought to convey by it or by his many other expressions, for which he was punished." *Id.*

<sup>9</sup> See *Eichman*, 110 S. Ct. at 2411 (Stevens, J., dissenting). Justice Stevens, in his dissent, described the government's legitimate interest in preserving the symbolic value of the flag:

To us, the flag is a reminder both that the struggle for liberty and equality is unceasing, and that our obligation of tolerance and respect for all our fellow citizens encompasses those who disagree with us—indeed, even those whose ideas are disagreeable or offensive.

Thus, the Government may—indeed, it should—protect the symbolic value of the flag without regard to the specific content of the flag burners' speech.

*Id.*

<sup>10</sup> See *Johnson*, 109 S. Ct. at 2540-48.

<sup>11</sup> See TEX. PENAL CODE ANN. § 42.09 (Vernon 1989) (flag desecration).

<sup>12</sup> *Johnson*, 109 S. Ct. at 2537-38.

<sup>13</sup> *Id.* at 2537 (summarizing opinion of lower court in *Johnson v. State*, 755 S.W.2d 92, 96 (Tex. Crim. App. 1988), *aff'd*, 109 S. Ct. 2533 (1989)). Texas Penal Code section 42.09 provided in full:

§ 42.09. Desecration of Venerated Object

(a) A person commits an offense if he intentionally or knowingly desecrates:

- (1) a public monument;
- (2) a place of worship or burial; or
- (3) a state or national flag.

(b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

(c) An offense under this section is a Class A misdemeanor.

TEX. PENAL CODE ANN. § 42.09 (Vernon 1989).

<sup>14</sup> TEX. PENAL CODE ANN. § 42.01 (Vernon 1989). Section 42.01, entitled "Disorderly

case against Johnson therefore rested on its contention that the state had a legitimate interest in "preserving the flag as a symbol of nationhood and national unity."<sup>15</sup>

In examining the efficacy of this argument, the majority considered constitutional precedent in regulating conduct; it examined whether such conduct may be considered expressive and thereby at least in part protected under the aegis of the free speech clause of the first amendment. According to *United States v. O'Brien*,<sup>16</sup> a case involving draft-card burning by war resisters,

a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on the alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>17</sup>

Although the *O'Brien* Court held that criminalizing the destruction of selective service cards placed no such burden on free speech and that an efficient system of conscription was an "important or substantial government interest," the Brennan majority found Johnson's "conduct 'sufficiently imbued with elements of communication,' to implicate the First Amendment."<sup>18</sup>

Since Johnson's conduct was expressive, that is, content-based with communicative impact, the Court reasoned that the constitutionality of statutory regulation fell under the governance of *Boos v. Barry*.<sup>19</sup> In that decision, Justice Sandra Day O'Connor had concluded that any "content-based restriction on political speech in a public forum . . . must be subjected to the most exacting scrutiny. Thus, we have required the State to show that 'the regulation is

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Conduct," provides, in pertinent part:

- (a) A person commits an offense if he intentionally or knowingly: (1) uses abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace.

*Id.* The Court held that section 42.01 demonstrates Texas' ability to prevent disturbances of the peace without punishing flag desecration. *Johnson*, 109 S. Ct. at 2538.

<sup>15</sup> *Johnson*, 109 S. Ct. at 2542.

<sup>16</sup> 391 U.S. 367 (1968).

<sup>17</sup> *Id.* at 377.

<sup>18</sup> See *Johnson*, 109 S. Ct. at 2540 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). The *Johnson* Court held that the expressive, overtly political nature of Johnson's conduct was both "intentional and overwhelmingly apparent," and thus protected under the first amendment. *Id.*

<sup>19</sup> See *id.* at 2543 (citing *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'"<sup>20</sup> And the compelling state interest which had to be so narrowly drawn to satisfy the *Barry* standard was, the government claimed, Texas' "interest in preserving the special symbolic character of the flag."<sup>21</sup>

The Brennan majority rejected the government's argument for two reasons. First, if the government sought to ensure "the special symbolic character of the flag" by protecting its physical integrity, the statute had failed to accomplish that end in all circumstances; it expressly exempted from criminal penalty any burning undertaken to dispose properly of a worn or damaged flag. The State's suggestion that in those instances the flag ought not be considered symbolic failed to impress the Justices.

If we were to hold that a State may forbid flag-burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag—we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol . . . only in one direction.<sup>22</sup>

The government's argument clearly penalized the intention behind the act rather than the act itself. Criminality lay in the political motivation that animated the flag-burning, thereby protecting one type of opinion regarding the symbolic meaning of the flag, but not another: a clear violation of the free speech clause.

Justice Brennan's reasoning leads to his second conclusion, that the Texas statute did not attempt to preserve the physical integrity of the flag per se but rather sought to protect the *idea* behind the physical integrity of the flag. Statutes designed to protect the symbolic significance of the flag would therefore have a chilling effect by suppressing political expression. Justice Brennan "seconded" the opinion of the Texas district court.

Recognizing that the right to differ is the centerpiece of our First Amendment freedoms, . . . a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it can-

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<sup>20</sup> *Barry*, 485 U.S. at 321 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

<sup>21</sup> See *Johnson*, 109 S. Ct. at 2543. Texas also emphasized the flag's historic and symbolic role in society. *Id.*

<sup>22</sup> *Id.* at 2546.



not mandate the status or feeling the symbol purports to represent.<sup>23</sup>

In reaction to the specter of repressing political criticism, Justice Brennan recalled the bedrock principle underlying the first amendment: "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>24</sup>

In the storm following the *Johnson* decision, many politicians read the opinion as though it had left the door ajar for the statutory protection of the flag and sought to draw up a more circumscribed bill which would meet the demands of both *Johnson* and *Barry*. "We reject the suggestion," Justice Brennan had written, "urged at oral argument by counsel for Johnson, that the Government lacks 'any state interest whatsoever' in regulating the manner in which the flag may be displayed."<sup>25</sup> Accordingly, in 1989, Congress passed the Flag Protection Act,<sup>26</sup> which was allegedly "con-

<sup>23</sup> *Id.* at 2537 (quoting *Johnson v. State*, 755 S.W.2d 92, 97 (Tex. Crim. App. 1988), *aff'd*, 109 S. Ct. 2533 (1989)).

<sup>24</sup> *Id.* at 2544.

<sup>25</sup> *Johnson*, 109 S. Ct. at 2547. See Pub. L. No. 829, 56 Stat. 1074 (1942).

To amend Public Law Numbered 623, approved June 22, 1942, entitled 'Joint resolution to codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America' [designation of where displayed (public institutions, polling places, schools), when (daylight except for special occasions) (not in inclement weather) (holidays), how displayed ("raised briskly and lowered ceremoniously"), how not to be displayed (as drapery, or below any flag of another nation)].

SECT.4. That no disrespect should be shown to the flag of the United States of America . . .

(b) The flag should never touch anything beneath it, such as the ground, the floor, water, or merchandise.

(c) The flag should never be carried flat or horizontally, but always aloft and free . . .

(e) The flag should never be fastened, displayed, used, or stored in such a manner as will permit it to be easily torn, soiled, or damaged in any way . . .

(g) The flag should never have placed upon it, nor on any part of it, nor attached to it any mark, insignia, letter, word, figure, design, picture, or drawing of any nature . . .

(i) The flag should never be used for advertising purposes in any manner whatsoever. It should not be embroidered on such articles as cushions or handkerchiefs and the like, printed or otherwise impressed on paper napkins or boxes or anything that is designed for temporary use and discard; or used as any portion of a costume or athletic uniform . . .

(j) The flag, when it is in such a condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning . . .

*Id.*

<sup>26</sup> See *supra* note 3.

tent-neutral" and whose enforcement therefore did not "turn on communicative impact."<sup>27</sup> Supporters claimed that the bill met constitutional muster since it was deliberately written to avoid dealing with the motivation behind acts of flag desecration. "When it comes to the American flag—that one symbol of the spirit of our democracy, we care more about protecting its physical integrity than about determining why its integrity has been threatened or who has threatened [sic] it."<sup>28</sup>

In addition to addressing the "content based" objection to flag desecration statutes, Congress also sought to satisfy the Supreme Court's criterion concerning "communicative impact." The legislative history of the Act indicates that both legal scholars and elected representatives understood communicative impact in terms of witnesses' perception of a person engaged in flag-burning rather than in the intention of the flag-burner. By crafting a bill which, unlike the Texas statute, avoided the issue of offense given by-standers, it was assumed that the Flag Protection Act of 1989 would satisfy the *Barry* test of a narrowly drawn statute. However, this presupposition proved wrong.

The *Johnson* decision had emphasized that recognition of the government's legitimate interest in promoting flag etiquette was not permission to "criminally punish a person for burning a flag as a means of political protest."<sup>29</sup> Although the Act eliminated that dimension of "communicative impact" attributable to the perceptions of onlookers, it retained the intrusive need to examine the intentionality behind the act of flag-burning itself and thereby implicitly concerned itself with the effect or communicative impact those intentions might have. The law specifically distinguished between legitimate and illegitimate intentions—flag-burning as protest versus flag-burning as respectful disposal of a soiled flag—which would prove dispositive in determining the legality of specific acts of flag-burning.<sup>30</sup> The Act therefore failed to establish itself as "content-neutral" since at its very heart lay the issue of expressive conduct and communicative impact. In *United States v.*

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<sup>27</sup> See *Johnson*, 109 S. Ct. at 2539-40 (whether treatment of flag violates law depends on likely communicative impact of expressive conduct); S. REP. NO. 152, *supra* note 3, at 9-11 (same). Under the Act, sanctions would be warranted, regardless of the actor's intent to communicate any idea. *Id.* at 10.

<sup>28</sup> S. REP. NO. 152, *supra* note 3, at 5.

<sup>29</sup> *Johnson*, 109 S. Ct. at 2547.

<sup>30</sup> See *Eichman*, 110 S. Ct. at 2409; see also *supra* note 3 (Flag Protection Act amended after *Johnson*).

*Eichman*, which challenged the Act's constitutionality, the Brennan majority had no alternative but to follow *Johnson* and overturn the statute: "Government may create national symbols, promote them, and encourage their respectful treatment. But the Flag Protection Act goes well beyond this by criminally proscribing expressive conduct because of its likely communicative impact."<sup>31</sup>

In both *Johnson* and *Eichman*, the Brennan opinions were met by consternation on the part of the dissenting justices (Rehnquist, White, O'Connor, and Stevens). The dissenters, however, failed to raise objections powerful enough to counter Justice Brennan's smooth legal arguments and twice lost the opportunity to secure a majority for the constitutionality of the flag desecration statutes. This failure was due, at least in part, to the aporetic nature of the dissent which reflected the decentered construction of legal discourse. In short, the two sides were not talking about the same thing.

While the Brennan majority construed the case along the lines of free speech, the Court's dissonant voices argued that flag desecration concerns a wholly different question. The dissenters have maintained that flag-burning does not raise the issue of "content-based" positions within the spectrum of political discourse,<sup>32</sup> but rather undermines the very possibility of political discourse itself, symbolized as the flag's "intangible dimension."<sup>33</sup> In other words, the flag serves as a metaphor for the epistemo-social conditions for political discourse. To deface the flag is, therefore, to efface the *sine qua non* of speech whose circulation is the life blood of the body politic. Desecration voids language of political significance and meaning. "Far from being a case of 'one picture being worth a thousand words,'" argued Chief Justice Rehnquist, "flag burning is the equivalent of an in articulate [sic] grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others."<sup>34</sup> In the opinion of the dissenting Justices, the hostility evinced by the desecration of the flag simply left them—and everyone—speechless.

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<sup>31</sup> *Eichman*, 110 S. Ct. at 2409.

<sup>32</sup> See *Johnson*, 109 S. Ct. at 2552 (Rehnquist, C.J., dissenting) ("flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas").

<sup>33</sup> *Id.* at 2556 (Stevens, J., dissenting). "Even if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable." *Id.* (Stevens, J., dissenting).

<sup>34</sup> *Id.* at 2553 (Rehnquist, C.J., dissenting).

Obligated as they were by their constitutional duty, the dissenters were compelled to speak about that which is unspeakable. By declaring the constitutional protection of flag-burning and thereby safeguarding the unspeakable, the majority opinion had negated the possibility of its own speech. In contrast, by decrying the unspeakable, by condemning flag desecration, the dissonant voices on the Court implicitly defended the epistemo-social conditions of speech itself. Hence, flag desecration statutes did not distinguish between legitimate and illegitimate political criticism, lawful and unlawful speech, but rather established the boundary between speech and non-speech.

Yet, articulating this distinction clearly seemed beyond both the constraints of legal discourse and the competence of the Justices in question.<sup>35</sup> Neither Chief Justice Rehnquist nor Justice Stevens was willing to articulate the presuppositions of legal discourse; each failed to specify the criteria that distinguish political speech from non-speech. To do so would require the exploration and exposition of idealist, critical legal philosophy—something beyond the ken of the Chief Justice whose “strict constructionism” reduces constitutional theory to the technical application of a naive “jurisprudence of original intention.”<sup>36</sup> Even though their defense of flag desecration statutes delineated the boundary between speech and non-speech, the dissenters either would not—or could not—explain the conditions of coming to speech in legal discourse, *i.e.*, the metaphor of the flag, and hence were silenced by unspeakable acts.

It is not surprising, therefore, that the dissent was marked by frustration and an inarticulate anger that sought to compensate for its own silence on the epistemo-social presuppositions of speech by attacking the views of the majority. In the *Johnson* decision, for example, Chief Justice Rehnquist upbraided Justice Brennan’s opinion for indulging in “a regrettably patronizing civics lecture,”<sup>37</sup> yet did little more himself in page after page of patriotic narrative, quoting at length Ralph Waldo Emerson’s *Concord Hymn*, John

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<sup>35</sup> Chief Justice Rehnquist had previously admitted as much in his dissenting opinion in *Smith v. Goguen*, 415 U.S. 566, 602 (1974) (Rehnquist, C.J., dissenting), when he stated “[t]he significance of the flag, and the deep emotional feelings it arouses in a large part of our citizenry, cannot be fully expressed in the two dimensions of a lawyer’s brief or of a judicial opinion.” *Id.* (Rehnquist, C.J., dissenting).

<sup>36</sup> See McBride, *Religion and the First Amendment: An Inquiry into the Presuppositions of the “Jurisprudence of Original Intention,”* 6 J.L. & RELIGION 1, 1-23 (1988).

<sup>37</sup> *Johnson*, 109 S. Ct. at 2555 (Rehnquist, C.J., dissenting).

Greenleaf Whittier's *Barbara Frietchie*, and Francis Scott Key's *Star Spangled Banner*. The Chief Justice legitimated this paen to the flag by reference to Justice Holmes's aphorism, "a page of history is worth a volume of logic,"<sup>38</sup> in a case where clearly a page of logic would do.

Likewise, Justice Stevens seemed unable to articulate the nature of this "intangible dimension" of the flag except "as a symbol [whose value] cannot be measured."<sup>39</sup> Despite the apparent unquantifiable value of the flag, Justice Stevens believed that flag desecration "diminishes the value of an important national asset."<sup>40</sup> Stevens subsequently reiterated his position in *Eichman* by avowing "[o]bviously that value cannot be measured, or even described, with any precision,"<sup>41</sup> rather insisting that not only flag-burning, but the majority's opinion in *Johnson* diminished the flag's standing. "[T]he residual value of the symbol after this Court's decision in *Texas v. Johnson* is surely not the same as it was a year ago."<sup>42</sup>

Neither the Rehnquist nor the Stevens opinion in *Johnson* and *Eichman* analyzed the "intangible dimension" of the flag that they sought to protect. The crucial discussion of what they might regard as the epistemo-social conditions for political discourse remained unspoken. In its place was substituted the insistent invocation of the flag as a "unique symbol," an obsessive-compulsive utterance that appeared throughout the country in the speeches of politicians. The appropriation of this phrase by the dissenting Justices reflected the exhaustion of legal discourse to explain itself critically. And although Brennan's well-crafted opinions presented persuasive arguments for the free speech construction of the flag desecration issue, they did not seem to engage the depth of feeling and the philosophical complexity of objections so inarticulately raised by the dissenting Justices. Consequently, the tensions between these two positions in this decentered legal discourse threaten to be resolved in an extralegal arena: the political campaigns of 1990-92. Rather than in the courtroom, it is in the political context that the dispute ultimately may be settled in the move-

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<sup>38</sup> *Id.* at 2548 (Rehnquist, C.J., dissenting) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

<sup>39</sup> *Id.* at 2556 (Stevens, J., dissenting).

<sup>40</sup> *Id.* at 2557 (Stevens, J., dissenting).

<sup>41</sup> *Eichman*, 110 S. Ct. at 2410 (Stevens, J., dissenting).

<sup>42</sup> *Id.* at 2412 (Stevens, J., dissenting).

ment for a constitutional amendment to protect the physical integrity of the flag. Hence, the deconstruction of legal analysis of flag desecration inevitably moves beyond the normative frontiers of the law to the broader sociological context of political discourse. Here lies the point of origin which fostered the minority's objection to Justice Brennan's opinion and fueled the outrage of both politicians and the public at the Supreme Court's rulings. The disproportionate reaction to the *Johnson* and *Eichman* decisions suggests that the Court had encountered a very powerful force animating both the body politic and society-at-large—a force that has profound and dangerous implications for the American legal tradition in the Bill of Rights, which has remained unchanged for two hundred years.

### III. SPEAKING OF THE FLAG

The rhythmic surges, which swept through the body politic after the flag-burning cases, were expressed in alarmed calls for the protection of the flag against "the enormity of the offense"<sup>43</sup> given by Gregory Lee Johnson and others like him. Although the threat presented by political protesters seemed marginal at best, the overturning of the flag desecration statutes left in its wake an abiding sense of vulnerability, opening the body politic to attack. It was as if not only the flag but the country itself were exposed to a great danger, and that it was incumbent upon the nation's elected representatives to ensure that the flag be "kept inviolate."<sup>44</sup>

Politicians rushed in to shore up this weakness and shield the flag, regardless of constitutional considerations. Even such liberals as Senator Joseph Biden, Chair of the Senate Judiciary Committee, argued that the flag "is a symbol, but the fact that a message is attempt[ed] to be communicated or not communicated by its destruction is not the real reason why Americans want to protect it. They want to protect it because it is the flag, period. . . ."<sup>45</sup> Like their judicial counterparts among the dissenters on the Supreme Court, politicians seemed unable to explain in any sustained fashion the pressing need for legal or constitutional protection of the nation's standard. The depth of this irrational fear was evident in the irruption of political discourse by repetition compulsion. The

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<sup>43</sup> *Johnson*, 109 S. Ct. at 2548 (Kennedy, J., concurring).

<sup>44</sup> S.J. Res. 332, 101st Cong., 2d Sess. (1990) (proposed constitutional amendment).

<sup>45</sup> S. REP. No. 152, *supra* note 3, at 4.

cry for safeguarding "Old Glory" was legitimated by a recurrent appeal to the "uniqueness" of the flag—an explanation that supposedly could speak for itself.<sup>46</sup>

This "unique" attribute of the flag contagiously infused all manner of description.<sup>47</sup> But of all its uses, the term most often appeared in conjunction with the flag's role as a symbol: "THE FLAG OF THE UNITED STATES IS A *UNIQUE* SYMBOL THAT SERVES A *UNIQUE* PURPOSE."<sup>48</sup> "The subject matter of this legislation is unique, as the American flag has an historic and intangible value unlike any other symbol."<sup>49</sup> The term seemed to take on some hidden, shorthand meaning for unspoken, but tacitly understood, arguments. Not unexpectedly, this signifier was readily adopted by President Bush whose comments at the Flag Day ceremony, June 12, 1990, in the Rose Garden followed the announcement of the Supreme Court's decision in *Eichman* by one day. The President stated: "[T]he flag is a unique symbol. I can't speak for the other countries, but I can speak for how strongly I feel about this being the unique symbol of the United States. . . . I keep emphasizing the word 'unique' symbol of the United States of America."<sup>50</sup>

As if surprised by his own obsessive-compulsive need to use this signifier, the President's admission reflected its widespread appearance in the pertinent American political discourse. Of course, repetition compulsion is symptomatic of some repression that lies deeper in the psychic economy of the body politic. But the disclosure of that secret lies at the end rather than the beginning of rational inquiry. For the political analyst, the immediate task remains the deconstruction of the phrase "unique symbol" and its enigmatic identification with the flag.

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<sup>46</sup> "For more than 200 years, the American flag has occupied a unique position as a symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here." *Johnson*, 109 S. Ct. at 2548 (Rehnquist, C.J., dissenting).

<sup>47</sup> See *id.* ("flag has occupied a *unique* position"); S. REP. NO. 152, *supra* note 3, at 2 (recognizing "unique place occupied by the flag in our national life"); see also *id.* at 3 ("Congress is simply ratifying the unique status conferred upon the flag"); *id.* at 22 (statements of Sens. Hatch and Grassley) ("flag forms a *unique* common bond among us") (emphasis added).

<sup>48</sup> S. REP. NO. 152, *supra* note 3, at 2 (emphasis added).

<sup>49</sup> *Id.*

<sup>50</sup> *Remarks Upon Receiving a Replica of the Iwo Jima Memorial and an Exchange with Reporters*, 26 WEEKLY COMP. PRES. DOC. 937, 938 (June 12, 1990) [hereinafter *Remarks*].

What is meant by the phrase "unique symbol?" The *Oxford English Dictionary* suggests various meanings of "unique": "Of which there is only one; one and no other; single, sole, solitary; the only one of its kind."<sup>51</sup> If "unique" signifies that there is "only one," is the flag the only symbol that represents the nation? There are certain buildings and monuments that have national significance and engender a sense of respect among tourists and even jaded politicians: the Jefferson Memorial, the Washington Monument, the Lincoln Memorial, Congress, and the White House. It may be argued that, although hallowed spaces, they do not symbolize the United States. Does that mean that the flag alone represents America? Iconographically, that role is shared with other images, most evidently the bald eagle, which appears on the Great Seal of the United States, and the Statue of Liberty, which is identified with the country in popular culture. Hence, the flag is not the "one and only," "single," "sole," or "solitary" symbol of the United States of America. The *Oxford English Dictionary* also defines "unique" as "a thing of which there is only one example, copy or specimen."<sup>52</sup> Perhaps then the word "unique" means that there is but one flag which symbolizes the nation. However, despite the Betsy Ross myth, there is no one "original" flag. The American flag is an image which is infinitely reproducible and which has no original. Hence, in our present age of mass reproduction, the aura of authenticity that inheres in the "unique" original is likewise infinitely diffused and dispelled among its reproductions.<sup>53</sup>

Since the flag's uniqueness exists neither as the only symbol of the nation nor as an authentic original, perhaps it might be argued that in its status as "one of a kind," there is only one image of the American flag. But that cannot be true. Although there is one "official" American flag with thirteen stripes and fifty stars (established in 1960), there have been twenty-seven different flags of the United States since 1777, barring other versions of the flag during the Revolutionary War, for example, the Bunker Hill Flag, the Pine Tree Flag, the Gadsden Flag ["Don't Tread On Me"], and the Moultrie Flag. Some may contend that there is now but one "official" American flag; however, it is unlikely that the proponents of the constitutional amendment against flag desecration would ex-

<sup>51</sup> 19 OXFORD ENGLISH DICTIONARY, 73 (2d éd. 1989).

<sup>52</sup> *Id.* at 74.

<sup>53</sup> See Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in ILLUMINATIONS 219-53 (H. Arendt ed. 1968); J. BERGER, *WAYS OF SEEING* 29 (1980).



clude other versions of the American flag from protection, particularly if protesters were to destroy an historic banner such as the Fort McHenry Flag preserved at the Smithsonian. At most, one could argue that the "Stars and Stripes" image of the American flag, generally speaking, is unique. Yet its vague iconic description with variations in the numbers of stars and even stripes (fifteen between the years 1795-1818) mitigates against the uniqueness of the emblem itself.

If its uniqueness does not describe the flag itself, perhaps its uniqueness is attributable not to the flag, but to its referent. Of course, one could argue that the "Stars and Stripes," in whatever form, is the only flag to represent the United States, but such a claim, in itself, is axiomatic; the "Stars and Stripes," then, is no more unique than the Union Jack is to Great Britain or the *tricolore* is to France. Yet the phrase "unique symbol" seems to be making a claim broader than just strict sovereignty. In this respect, the *Oxford English Dictionary* provides a definition which casts light on the mystery. Following its reference to "one of a kind," the lexicon suggests "having no like or equal; standing alone in comparison with others, freq[ue]ntly by reason of superior excellence; unequalled, unparalleled, unrivaled."<sup>54</sup> If uniqueness applies to its referent rather than the emblem itself, then the flag as a "unique symbol" represents something "unequalled, unparalleled, unrivaled," in other words, the nation.

According to the Senate Report on the Flag Protection bill, "the American flag has come to be the visible embodiment of our Nation."<sup>55</sup> But unless the attributes "unequalled, unparalleled, [and] unrivaled" are tantamount to an unabashed jingoism, the flag's representation of the nation must imply that there are grounds for the assertion of superiority beyond sheer bravado. The President endorsed this sentiment in his remarks at the Flag Day ceremony by citing one of his predecessors: "[Woodrow Wilson] knew that the flag was more than mere fabric; rather, a mosaic of values and of liberty."<sup>56</sup> These norms to which the President referred are allegedly enfolded in the body politic as the very foundation of the American social order. Hence, the flag is a "truly unique symbol of all that we are and that we believe."<sup>57</sup> Its unique-

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<sup>54</sup> 19 OXFORD ENGLISH DICTIONARY 73 (2d ed. 1989).

<sup>55</sup> S. REP. NO. 152, *supra* note 3, at 2.

<sup>56</sup> Remarks, *supra* note 50.

<sup>57</sup> *Id.*

ness lies in our "national commitment to those ideals"<sup>58</sup> which constitute our normative world view.

The *sine qua non* of membership in this social order—to be a citizen of the American body politic—requires at the very least tacit agreement with its ethos. Because American national identity is shaped by these values, Americans who disavow this normative world view negate themselves; they make themselves "other." These values thereby mark the borders of the social order more surely than territorial boundaries; they are what differentiate Americans from non-Americans. The consequences are twofold: being American means more than being in America, and if the term American is to retain its "uniqueness," its normative borders must be protected. If the flag is "all that we are and all we believe," burning it attacks the boundaries of the body politic and undermines the epistemo-social conditions necessary for meaningful political discourse.

Since the American flag embodies American political self-consciousness (what it means to be American), it is logical that "[m]illions and millions of Americans regard it with an almost mystical reverence."<sup>59</sup> The conflation of self-consciousness and reverence is due not merely to the place which any standard has in the hearts of its nationals, but to the specific meaning of the American flag inscribed in its design. On June 13, 1777, the Continental Congress first adopted the "Stars and Stripes" motif for the nation's emblem: "RESOLVED: that the flag of the United States be made of thirteen stripes, alternate red and white; that the union be thirteen stars, white in a blue field, representing a new constellation."<sup>60</sup> The metaphor of the constellation suggested an analogous relationship between the heavens and the earth. The appearance of a new stellar configuration symbolized the "birth" of a nation whose destiny would be markedly different from all those which had come before and would come after. Gazing at the flag, the eyes of Americans would be drawn by the horizontal stripes toward the canton of stars that collapsed past and future into an eternal, mythological present. As the culmination of historical trajectories and the transcendence of the "Old World," the founding of America brought history to a close, replacing the concrete with the

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<sup>58</sup> *Eichman*, 110 S. Ct. at 2411 (Stevens, J., dissenting).

<sup>59</sup> *Johnson*, 109 S. Ct. at 2552 (Rehnquist, C.J., dissenting).

<sup>60</sup> M. QUAIFFÉ, M. WEIG & R. APPLEMAN, *THE HISTORY OF THE UNITED STATES FLAG FROM THE REVOLUTION TO THE PRESENT, INCLUDING A GUIDE TO ITS USE AND DISPLAY* 29 (1961).

abstract, normative worldview of civil society, and the inalienable rights of its citizens. History became transmuted into the process of legal discourse. The stars of the canton therefore signify more than the original thirteen colonies. They embody the organizing principle of American society. If, as Walter Benjamin once argued, "[i]deas are to objects as constellations are to stars,"<sup>61</sup> the concrete, *i.e.*, objects or stars, become meaningful only in abstract configurations—in their relationship to the totality. Likewise, the individual members of the body politic have meaning only insofar as they are related to the normative worldview of the abstract totality.

As individuals whose legal "personhood" is derived from their relationship to the totality, citizens stand in relation to the body politic as do creatures to the creation. It should not be surprising, therefore, that Americans regard the symbol of that creation or totality with awe and religious devotion. In the words of President Bush on Flag Day, "The 'new constellation' of which the Continental Congress spoke was our young Nation, a nation where 'freedom's holy light' would gleam forth, giving hope to all those living in the darkness of tyranny and serving as a guide to all those charting their own course toward liberty and self-government."<sup>62</sup> In the nation, symbolized by the flag, lies the power to redeem those who would be "other"-wise lost and incomplete. The salvific overtones of the totality which locate, complete, and identify individuals imbue the nation's emblem with its aura of sanctity. "What that flag encapsulates," insisted President Bush, "is too sacred to be abused."<sup>63</sup> As the visual representation of the totality, the flag makes possible the individual as citizen of the body politic and establishes the *sine qua non* of meaningful speech—speech made recognizable by the totality as political discourse. Therefore, to burn the flag is to attack not just the policies of the government but the force that animates the body politic. Yet, even though the flag symbolizes the power of creation that makes the citizen what s/he is, is the metaphor of sacredness merely an hyperbole or is it an accurate sociological description?

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<sup>61</sup> W. BENJAMIN, *Epistemo-Critical Prologue*, THE ORIGIN OF GERMAN TRAGIC DRAMA 34 (J. Osbourne trans. 1977).

<sup>62</sup> Proclamation No. 6145: President's 1990 Proclamation of Flag Day and National Flag Week, 26 WEEKLY COMP. PRES. DOC. 949, 950 (June 14, 1990).

<sup>63</sup> Remarks, *supra* note 50.

## IV. TOTEM AND TABOO

In his classic text *The Elementary Forms of the Religious Life*, the founder of modern sociology, Emile Durkheim, argued that there exists an intimate relationship in human culture between religion and society.<sup>64</sup> Unlike many other colleagues influenced by the presuppositions of Social Darwinism, Durkheim claimed that elements of social organization, common to aboriginal societies, were still present in the modern social order. But to uncover the mystery of societal cohesiveness, or what he called "social solidarity" in the present age, required a reexamination of "primitive" social organization.<sup>65</sup>

"This organization, which at first may have appeared to us as purely logical, is at the same time moral. A single principle animates it and makes its unity: this is the totem."<sup>66</sup> Depicted as either a plant or animal, the totem was seen as the primary mode of the individual's social identification: one was a member of a clan, signified by the totem. By virtue of the totem, the individual tapped into the source of energy which animated the totality.<sup>67</sup> "Thus the totem is before all a symbol, a material expression of something else," wrote Durkheim. "But of what?"<sup>68</sup> As a mark of identification, the totem distinguished not only members of one clan from another but also its property and all manner of clan-specific cultural expression. Hence, the "totemic principle" must be "nothing else than the clan itself."<sup>69</sup>

If one assumes that, despite similarities, there is a radical break between aboriginal and modern societies, their relationship can be, at best, analogous. That is, the totem is to the clan what the flag is to the nation. However, if one believes, as did Durkheim, that vestigial elements of aboriginal social organization are embedded in modern social solidarity, then "the totem is the flag of the clan. It is therefore natural that the impressions aroused by the clan in individual minds—impressions of dependence and of increased vitality—should fix themselves to the idea of the totem

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<sup>64</sup> See E. DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* *passim* (J.W. Swain trans. 1915).

<sup>65</sup> *Id.* at 174-75; see also E. DURKHEIM, *supra* note 6, *passim* (discussing "social solidarity").

<sup>66</sup> *Id.* at 175.

<sup>67</sup> See *id.* at 224.

<sup>68</sup> *Id.* at 236.

<sup>69</sup> *Id.*

rather than that of the clan, for the clan is too complex a reality to be represented clearly in all its complex unity by such rudimentary intelligences."<sup>70</sup>

From the Durkheimian perspective, the transference of aboriginal totemic associations to the modern-day totemic emblem helps to explain the unspoken reasons for contemporary devotion to the flag. The totem's quality of unbounded, unquantifiable energy inspired awe and fascination in the individual clan member—classical indications of its divine status.<sup>71</sup> Eventually, the flag, like the totem, subsumes that which it represents and inspires such emotions without reference to the underlying reality.<sup>72</sup> "Taking the words in a large sense, we may say that it is the god adored by each totemic cult. Yet it is an impersonal god, without name or history, immanent in the world and diffused in an innumerable multitude of things."<sup>73</sup> Although the aboriginal totem or its modern counterpart, the flag, may not symbolize a personal deity, it is nonetheless the prototype for the "sacred thing." Indeed, all persons, words, actions, and institutions share in its sacred status by their material or conceptual proximity to the totem or flag.<sup>74</sup>

As a sacred object, the totem "inspires, in one way or another, a collective sentiment of respect which removes it from profane touches."<sup>75</sup> This "intangible dimension" of the flag is ensured by heavily ritualized forms of contact, evident in the code of flag etiquette. Such contact may take different forms. Public Law 829 prescribes, in sections 5 through 7, the conduct proper to the flag salute, designed to acknowledge the normative authority of the nation's standard. Within sight of the flag, all should stand at attention. Military personnel must give the military salute. Women civilians should place their right hand over their heart. Civilian men should do likewise, additionally removing their hats. Aliens need not salute the flag but should stand at attention. Orally, the relationship to the totem has been mediated by an oath of fealty, the Pledge of Allegiance.<sup>76</sup> Finally, the code of etiquette mandates the

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<sup>70</sup> *Id.* at 252.

<sup>71</sup> See generally R. OTTO, *THE IDEA OF THE HOLY: AN INQUIRY INTO THE NON-RATIONAL FACTOR IN THE IDEA OF THE DIVINE AND ITS RELATION TO THE RATIONAL* (J.W. Harvey trans. 1958).

<sup>72</sup> See E. DURKHEIM, *supra* note 64, at 251-52.

<sup>73</sup> *Id.* at 217.

<sup>74</sup> *Id.* at 140.

<sup>75</sup> *Id.* at 175.

<sup>76</sup> See Pub. L. No. 829-77 (1942); *supra* note 25 and accompanying text. Written in

proper tactile contact with the flag. For example, the totem should never be profaned by touching the ground. As the visible manifestation of the totality, the flag, like the body of a god, must remain sacrosanct. Therefore, handling the flag itself demands a ritual of its own, requiring the proper procedure for folding, unfolding, and display, as well as the proper reverence.<sup>77</sup>

These rites safeguard the boundary between the holy and the secular, the sacred and the profane. To transgress those boundaries is therefore to profane the totem. Accordingly, Durkheim argued: "Before all are the interdictions of contact; these are the original taboos, of which the others are scarcely more than particular varieties. They rest upon the principle that the profane should never touch the sacred."<sup>78</sup> Anthropologically, flag-burning as a means of political protest is therefore a violation of taboo since, without the proper reverence for the totem, the flag has been profaned—desecrated—in the eyes of "patriotic" Americans, the members of the totemic clan.

The outrage expressed by many Americans at what they regard as an abomination verifies the religious construction of the flag-burning controversy. Not only observers, however, apprehend flag desecration as a religious act. The choice of flag desecration, rather than some other means of protest, likewise verifies the protesters' religious construction of the act, even if undertaken as a form of political protest. In other words, aware of its totemic significance, they intentionally violate the taboo protecting the flag in order to attack the normative world view of the American body politic. Indeed, the very effectiveness of the protest is predicated upon the manipulation of the religious imagination.

Both the minority and majority opinions in *Johnson* and *Eichman* implicitly recognized this operative premise behind the act of flag-burning. Chief Justice Rehnquist, for example, noted

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1892 to celebrate the quadricentennial of America's "discovery" by Columbus, the Pledge was endorsed by the Congress on Flag Day, June 14, 1954, when House Joint Resolution 243 added "under God" to the oath. H.R.J. Res. 243, 83d Cong., 2d Sess. (1954). This totemic rite holds such importance in the minds of some politicians that even the President has questioned the patriotism of those who, like Governor Dukakis and the Supreme Court, refused to make its recitation mandatory for school children. See *West Virginia v. Barnette*, 319 U.S. 624, 642 (1943). In *Barnette*, the Court upheld the right of a Jehovah's Witness to refuse to salute the American flag; to honor the flag—in effect an idol—would violate her religion's prohibition against graven images. *Id.* at 629, 642.

<sup>77</sup> See *supra* note 25.

<sup>78</sup> E. DURKHEIM, *supra* note 64, at 341.

that "Johnson was free to make any verbal denunciation of the flag that he wished; indeed, he was free to burn the flag in private."<sup>79</sup> Yet Johnson's choice to stage publicly a flag-burning at the Republican National Convention evidences his presupposition that the ritualized violation of taboo—the desecration of the nation's "unique" symbol—had an effect far surpassing that of mere verbal denunciation. As Justice Brennan elsewhere noted, "the flag-burner's message depends in part on the viewer's ability to make this very association."<sup>80</sup>

To both the flag-burners and the witnessing public, flag desecration is conceived in terms of magical practices. While homeopathic magic operates on the principle of similarity, contagious magic functions according to contiguity. The recognition of both forms is essential to understand the dynamic that operates beneath the surface of this type of political protest.

By destroying one American flag, political protesters homeopathically destroy all American flags. In this respect, flag desecration is markedly different from the destruction of profane property, government or otherwise, to which it has been compared by politicians.<sup>81</sup> In other words, it could not be argued that, by burning one draft card, one has burned all draft cards. Although the destruction of profane property limits damage to the object itself, desecration of the sacred defiles all similar objects. Hence, the desired effect of flag-burning is based upon the magical inscription of the act.

Flag desecration does not merely attack all American flags *per se* but rather what they symbolize. Consequently, arguments which purport to limit legislation to protect the physical integrity of the flag alone are disingenuous. As Senators Orrin Hatch and Charles Grassley have admitted, "No one claims that we are interested in

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<sup>79</sup> *Johnson*, 109 S. Ct. at 2553 (Rehnquist, C.J., dissenting).

<sup>80</sup> *Eichman*, 110 S. Ct. at 2408 n.6.

<sup>81</sup> *Cf. United States v. O'Brien*, 391 U.S. 367, 380 (1968) (Court acknowledged many important functions of selective service certificates); *see, e.g.*, Senator Alfonse D'Amato's comments classifying flag and draft card burning together offered on Flag Day 1990. "I have to say that I do not think there is any question that if the Congress of the United States in its legislative capacity has been able to enact legislation that protects draft cards and would hold those who burn their draft cards in protest of whatever the Government policy is that they wish to protest, and the courts have found that they can be sent to prison for this, it would seem to me that when we pass legislation protecting the flag that the flag is a heck of a lot more important for us to be able to say it shall not be desecrated than the burning of a draft card." 136 Cong. Rec. S7936 (daily ed. June 14, 1990) (statement of Sen. D'Amato). (debate surrounding S. Rep. No. 152).

protecting the material, the thread and the dye in the flag. We protect the flag as a symbol . . . .”<sup>82</sup> Yet how can the destruction of a piece of cloth constitute an attack on the nation? Durkheim argued that “as far as religious thought is concerned, the part is equal to the whole; it has the same powers, the same efficacy.”<sup>83</sup> Since the flag is regarded as a synecdoche for the nation by most Americans, the destruction of the flag means the destruction of the nation and its central values. The widespread acceptance of the act’s magical character is evident in the President’s own response to the question of whether flag-burning endangered people: “Yes. It endangers the fabric of our country. . . .”<sup>84</sup> The hazard, therefore, exists not so much in a real “breach of peace” as in the magical defilement of the nation.

This danger posed by the homeopathic act of flag desecration is further augmented by contagious magic. Just as the sacred “spreads out from the totemic being to everything that is closely or remotely connected with it,”<sup>85</sup> so too does the transgression extend to all that is linked with the clan’s totem. Burning the flag defiles all those persons, places, words, times, and institutions which one associates with America. The “enormity of [Johnson’s] offense”<sup>86</sup> was no exaggeration; his act attacked not only government policies, but Congress, the President, the courts, the Constitution, and even America’s war casualties (as some irate citizens have pointed out). As Johnson seemed to be well aware, the ripple effect of contagious magic far exceeded anything that verbal denunciation could have accomplished alone.

Witnesses to flag-burning frequently express their anger at what they regard as tantamount to a physical attack on the United States. Although this does not follow logically, the physical borders of the country are nonetheless transmuted by the effects of this magical practice into socio-psychological boundaries that define the frontier of the clan. Flag-burners and their supporters are therefore marginalized and placed beyond the pale of the American nation, excluded from the clan by their act of self-alienation. In rejecting the normative world view of the American body politic (“Americanism” in the slang of patriotic discourse), these individu-

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<sup>82</sup> S. REP. NO. 152, *supra* note 3, at 24.

<sup>83</sup> E. DURKHEIM, *supra* note 64, at 261.

<sup>84</sup> *Remarks*, *supra* note 50, at 939.

<sup>85</sup> E. DURKHEIM, *supra* note 64, at 254.

<sup>86</sup> *Johnson*, 109 S. Ct. at 2548 (Kennedy, J., concurring).



als are deemed abnormal and anathematized most often by using pseudo-psychological labels. "During the debate they were called, among other things, freaks, kooks, nuts, geeks, clods, crazies, nit-wits, gnats, goons, and slobs."<sup>87</sup>

Ranging from dysfunctional to subhuman, these descriptions of flag-burners transmit a lucid message to the American public: flagburners are not like us. The designations of boundaries between the inside and the outside, the normal and the abnormal, the loyal and the subversive, all suggest a sociological category of identity based upon an aboriginal rather than modern form of social solidarity. Although the two Durkheimian models of social solidarity—mechanical and organic—are pure types and may appear together empirically in different proportions,<sup>88</sup> the response of the American public to flag desecration is particularly reminiscent of mechanical solidarity. Whereas organic solidarity is characterized by the interdependence of different social cells or individuals, each with a specially designated function, mechanical solidarity is "a system of segments homogeneous and similar to one another."<sup>89</sup> As evidenced by the marginalization of the flag-burner, outrage calls forth an anachronistic yearning for resemblance, where difference is subsumed under a collective conscience that imposes the image of commonality on one and all.

In contrast to mechanical solidarity, organic solidarity functions according to contractual agreement and cooperative effort in diverse tasks; hence, the juridical character of the law is restitutive. However, in those cases where juridical authority is under the influence of mechanical solidarity, "its primary and principal function is to create respect for the beliefs, traditions, and collective practices; that is, to defend the common conscience against all enemies within and without."<sup>90</sup> Durkheim describes such law as repressive: "The acts that it prohibits and qualifies as crimes are of two sorts. Either they directly manifest very violent dissemblance between the agent who accomplishes them and the collective type, or else they offend the organ of the common conscience."<sup>91</sup> Violating both, flag desecration offends not only the commonly-held

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<sup>87</sup> *Flag Amendment Fails in the House*, Newsday, June 22, 1990, at 5 (Nassau & Suffolk ed.).

<sup>88</sup> E. DURKHEIM, *supra* note 6, at 126-39.

<sup>89</sup> *Id.* at 131.

<sup>90</sup> *Id.* at 42.

<sup>91</sup> *Id.* at 61.

norms of the American body politic, but also establishes the flag-burner as an outsider. This radical dissemblance is an affront to the homogeneity of patriotic Americans who frequently experience a self-righteous desire to efface the individuality of the other. Aboriginal societies assume that the violation of taboos automatically brings its own punishment, for example, personal or economic misfortune, disease, famine, or even death. Though contemporary Americans may dismiss such assumptions as superstitious, Durkheim warns that "it is always completed by another [judgment], supposing human intervention. A real punishment is added to this, if it does not anticipate it, and this one is deliberately inflicted by men . . . ."<sup>92</sup> Repressive law therefore articulates in human terms the penalty for the violation of taboo ascribed to magical forces.

#### V. ESTABLISHMENT OF RELIGION

Although Justice Brennan wrote in *Texas v. Johnson* that no "separate juridical category exists for the American flag alone," either in legal precedent or in the Constitution itself,<sup>93</sup> the movement toward a Flag Protection amendment is intended to establish "just such a category in the Constitution's text."<sup>94</sup> Even though both sides perceived this irruption of the Bill of Rights as a question of first amendment freedom of speech, Durkheimian analysis demonstrates its essential implication of the first amendment's religion clauses. Divested of obscurant language, the flag protection amendment is nothing more than a codified form of religious interdiction.

Of course, it may be argued that if the flag is the totem of the nation and if both flag-burners and witnesses alike implicitly regard desecration as the violation of taboo, then why not institute such a religious interdiction in the Constitution? After all, as Chief Justice Rehnquist has suggested, "the government has not 'established' this feeling; 200 years of history have done that. The government is simply recognizing as a fact the profound regard for the American flag created by that history when it enacts statutes prohibiting the disrespectful public burning of the flag."<sup>95</sup>

Although phenomenologically flag desecration is predicated on

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<sup>92</sup> E. DURKHEIM, *supra* note 64, at 339.

<sup>93</sup> *Johnson*, 109 S. Ct. at 2546.

<sup>94</sup> S. REP. NO. 152, *supra* note 3, at 27 (commentary of Sens. Hatch and Grassley).

<sup>95</sup> *Johnson*, 109 S. Ct. at 2555 (Rehnquist, C.J., dissenting).

religious presuppositions and magical practices, the law is not obligated to recognize those presuppositions and practices. An activity's empirical verifiability does not necessitate its legal sanction. Hence, a flag's recognition as a totem does not imply that the state should punish political protesters failing to exhibit proper totemic reverence. The weight of the Chief Justice's argument is insufficient to endorse such a law.

Nonetheless, if the amendment were passed, its imposition on the Bill of Rights would introduce irreconcilable tensions into the Constitution; freedom of religion would be encroached upon by the establishment of an American civil religion, identified with the nation-state. The institutionalization of a state religion, even if obliquely established through religious interdiction, would impinge upon the free exercise of religion by American citizens. The coercive power of the state would place the nation side by side with the pantheon of gods. Some religious practitioners undoubtedly would find the situation intolerable, particularly those who have objected in the past to the state's usurpation of Biblical revelation.<sup>96</sup> As frightening as some believers have found the sacralization of the state,<sup>97</sup> the offense would be compounded by the state's recognition of the flag's totemic standing as a religious symbol. Paul Tillich, the eminent Protestant theologian previously cited by the Supreme Court in church-state cases,<sup>98</sup> noted:

Religious symbols point symbolically to that which transcends all of them. But since, as symbols, they participate in that to which they point, they always have the tendency (in the human mind, of course) to replace that to which they are supposed to point, and to become ultimate in themselves. And in the moment in which they do this, they become idols. . . . They become demonic at the moment in which they become elevated to the unconditional and ultimate character of the Holy itself.<sup>99</sup>

Hence, in the eyes of even some mainstream religious thinkers, the codification of religious interdiction and the criminalization of its violation would appear idolatrous. And, as Tillich argued, the potential exists for the "demonization" of a secular state, augmented

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<sup>96</sup> See A. COCHRANE, *THE CHURCH'S CONFESSION UNDER HITLER* 237-47 (1976) (quoting Barmen Declaration of 1934).

<sup>97</sup> See *West Virginia v. Barnette*, 319 U.S. 624, 630-31 (1943).

<sup>98</sup> See *United States v. Seeger*, 380 U.S. 163, 180 (1965), *overruled on other grounds by* *Welsh v. United States*, 398 U.S. 333 (1970).

<sup>99</sup> P. TILlich, *THEOLOGY OF CULTURE* 60 (R. Kimball ed. 1959).

by the aura of sanctity—a development which Tillich witnessed in Germany during his own lifetime.

Of course, some might object to this line of reasoning and argue that civil religion in this case is not really a religion since it is not historically linked to widely recognized religious faiths, such as Judaism, Christianity, and Hinduism. However, *stare decisis* has prohibited the Court from distinguishing between “true” and “false” religions, and from defining religion itself according to confessional guidelines.<sup>100</sup> In dismissing legal precedent, critics would therefore be obliged to present arguments rebutting the use of social scientific descriptions of religion (like Durkheim’s classic work) and the considerable body of scholarly literature on civil religion written over the past twenty years.<sup>101</sup>

## VI. CONCLUSION

As Tillich’s reasoning suggests, the greatest fear resulting from the Flag Protection amendment might be the consolidation of the coercive power of the state. By criminalizing the desecration of the flag, the law sacralizes the nation-state and thereby establishes a dangerous legal precedent. While the *Johnson* and *Eichman* decisions functionally allow the storm of controversy to rage in popular political discourse, the Flag Protection amendment would appropriate that rage in order to consolidate the power of the state through repressive law. In doing so, this action reinforces resemblance as a primary model of social cohesion and undermines the difference which anchors the concept of individualism in legal rights theory. The passage of the amendment would send a signal—as one suspects its authors intend—to discourage the advocacy of values at variance with the dominant social order. If, as many scholars argue, that order is biased in favor of whites rather than non-whites, the rich rather than the poor, and men rather than women, the criminalization of flag desecration embodies a re-

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<sup>100</sup> See *Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953); *United States v. Ballard*, 322 U.S. 78, 86-87 (1944), *rev’d on other grounds*, 329 U.S. 187 (1946).

<sup>101</sup> See generally R. BELLAH, *THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL* (1975); Bellah, *Civil Religion in America*, in *BEYOND BELIEF, ESSAYS ON RELIGION IN A POST-TRADITIONAL WORLD* 168-89 (1970); R. BELLAH & P. HAMMOND, *VARIETIES OF CIVIL RELIGION* (1980); *CIVIL RELIGION AND POLITICAL THEOLOGY* (L.S. Rouner ed. 1986); M.W. HUGHEY, *CIVIL RELIGION AND MORAL ORDER: THEORETICAL AND HISTORICAL DIMENSIONS* (1983); G. KELLY, *POLITICS AND RELIGIOUS CONSCIOUSNESS IN AMERICA* (1984); R. PIERARD & R. LINDER, *CIVIL RELIGION AND THE PRESIDENCY* (1988).

gression away from the promise of America, which builds its future on equal opportunity for all. Repressive law can be used effectively to marginalize and silence not only flag-burners and associated political dissidents, but even artists who use the totemic standing of the flag as a means to protest the dominant ethos. Through their criminalization, these voices would no longer have even the opportunity to be regarded as legitimate participants in the ongoing political discourse.

America therefore stands at a crossroads in the controversy over the proposed emendation of the Bill of Rights. Its citizens are torn between "two contrary forces, one centripetal, the other centrifugal, which cannot flourish at the same time. We cannot, at one and the same time, develop ourselves in two opposite senses."<sup>102</sup> In choosing between the principles of mechanical and organic solidarity, resemblance and difference, Americans will have to decide who we really are.

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<sup>102</sup> E. DURKHEIM, *supra* note 6, at 84.